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7 ANTHONY JAMES LEGLER,
8 Petitioner,
9 v.
10 KAREN FLETCHER, Acting Chief
11 Probation Officer,
Respondent.

Case No. [14-cv-01497-YGR](#) (PR)

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**ORDER GRANTING RENEWED
MOTION FOR APPOINTMENT OF
COUNSEL; AND APPOINTING
COUNSEL *NUNC PRO TUNC* TO
PREPARATION OF FEDERAL
PETITION FOR FILING**

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28 Petitioner, a state prisoner, has filed this petition for a writ of habeas corpus pursuant to U.S.C. § 2254 challenging his 2012 conviction in the Santa Clara County Superior Court of one count of committing a lewd or lascivious act on a child under 14 years of age. Dkt. 1 at 1-2. The trial court suspended imposition of sentence and placed Petitioner on three years of formal probation, including a one year county jail term. Dkt. 11, Ex. G at 1.

On June 3, 2014, the Court issued an Order to Show Cause. Dkt. 7. In the same Order, Petitioner's motion for appointment of counsel was also denied without prejudice to the Court's *sua sponte* reconsideration of such a motion. *Id.* at 3. Respondent has filed an answer to the petition, and Petitioner has filed a traverse. Dkts. 11, 15.

Before the Court is Petitioner's renewed motion for appointment of counsel, which was submitted on the same date as his traverse. Dkt. 14. He specifically requests the appointment of Patrick McKenna, Esq. of the Sixth District Appellate Project, by whom Petitioner was represented in state court. It appears that Attorney McKenna prepared Petitioner's federal petition and a traverse to the answer without compensation.

The Sixth Amendment's right to counsel does not apply in habeas corpus actions. *See Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986). The Court may, however, appoint

1 counsel to represent a habeas petitioner whenever “the court determines that the interests of justice
2 so require and such person is financially unable to obtain representation.” 18 U.S.C.
3 § 3006A(a)(2)(B). The decision to appoint counsel is within the discretion of the district court.
4 See *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986); *Knaubert*, 791 F.2d at 728.

5 Here, Petitioner points out that the record shows that in his pre-trial statements and
6 testimony at trial, he admitted that the alleged touching of his stepdaughter had occurred; however,
7 he consistently asserted that he committed the act as he fell asleep. Dkt. 15 at 3. Thus, in his
8 federal petition, Petitioner asserts six claims for relief: 1) ineffective assistance of trial counsel for
9 failing to call Dr. John C. Brady II to present expert testimony that Petitioner did not have the
10 personality characteristics of a child molester, as permitted by *People v. Stoll*, 49 Cal. 3d 1136
11 (1979)¹; 2) ineffective assistance of trial counsel for failing to consult with or call a sleep disorders
12 expert to testify at trial; 3) ineffective assistance of appellate counsel due to the Court of Appeal’s
13 failure to grant Petitioner funds to retain Dr. Rafael Pelayo, as an expert witness for purposes of
14 Petitioner’s state habeas proceedings; 4) the jury instruction regarding unconsciousness—adopted
15 largely from CALCRIM No. 3425—was ambiguous and created an inappropriate presumption of
16 consciousness; 5) ineffective assistance of trial counsel due to the failure to object to the
17 prosecutor’s reliance during closing argument on facts not in evidence; and 6) the cumulative
18 errors prejudiced Petitioner.

19 The Court finds that the appointment of counsel is warranted in this action and that
20 Attorney McKenna is already familiar with the facts of the case and has prepared pleadings in
21 support of the petition. Therefore, the Court exercises its discretion to appoint Patrick McKenna,
22 Esq. of the Sixth District Appellate Project to represent Petitioner in this action, *nunc pro tunc* to
23 his preparation of the federal petition for filing. Petitioner’s renewed motion for appointment of
24 counsel is GRANTED. Dkt. 14. Counsel should seek reimbursement pursuant to 18 U.S.C.
25 § 3006A(d) and (e) via the Federal Public Defender’s Office.

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27 ¹ Under California law, a psychological evaluation which concludes that a defendant does
28 not fit the psychological profile of a child molester is admissible as character evidence tending to
show that the defendant did not commit the crime. *Stoll*, 49 Cal. 3d at 1152. Such evaluations are
commonly referred to as *Stoll* evaluations.

1 The Clerk of the Court shall send a copy of this Order to Patrick McKenna, Esq., Sixth
2 District Appellate Project, 100 N. Winchester Blvd., Suite 310, Santa Clara, California 95050, to
3 Petitioner, to the Federal Public Defender, and to Respondent.

4 This Order terminates Docket No. 14.

5 IT IS SO ORDERED.

6 Dated: December 11, 2014


YVONNE GONZALEZ ROGERS
United States District Court Judge

United States District Court
Northern District of California

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